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Supreme Court of the United States

OCTOBER TERM 1960

No. 407

CITIZENS UTILITIES COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Petition urges two basic points of the Decision below which require review by this Court. First, the Decision permits Federal Power Commission jurisdiction to attach to hydro-electric facilities, on the "effect" theory of Section 23(b) of the Federal Power Act, without any foundational finding that the waters in which the "effect" is assertedly found are used or suitable for use for the transportation of persons or property in interstate or foreign commerce. This, we urged, was in direct conflict with all pertinent prior decisions of this Court and the Courts of Appeal. (Petition, pp. 7-14).

Second, the Decision below holds that all dams located on non-navigable waters of the United States, or on non-navigable tributaries of such waters, are automatically within Federal Power Commission jurisdiction regardless of the kind or *quantum* of "effect" such facilities have on the interests of interstate or foreign commerce in down-stream navigable waters. (Petition, pp. 15-18).

There are several matters in Respondent's Brief which we believe fortify the showing of necessity for review of these issues.

1. Respondent does not point to a single word in the Decision below which is suggested to be a finding by the Court of Appeals on the "commerce" issue. Instead, Re-

spondent appears to concede a) that the Decision below made no explicit finding on this issue (Resp. Br. p. 10) and b) that the predicate for any such finding can be found only in Respondent's own Decision. Respondent then argues that Petitioner seeks to review the evidence assertedly underlying Respondent's findings on the "commerce" issue.

We respectfully suggest that Respondent's analysis of Petitioner's argument is in error. Petitioner seeks no weighing of the evidence. To the contrary, Petitioner's position is that even if we concede the correctness of the fact findings most favorable to Respondent, a holding that these facts sanction a finding of "commerce" is insupportable as a matter of law.

One example will illustrate the point. We urged (Petition, pp. 12-13) that Respondent's findings of fact on the subject of log and pulp wood transportation on the stream could not properly sustain a finding of use or suitability for use of the stream in commerce. We pointed out that it was uncontested that the water transportation of logs shown in this case never once involved transportation in interstate or foreign commerce. Yet such a requirement is the fixed minimum denominator of all the cases which allow the pertinence of log transportation as a foundation for a showing of "commerce".

The Court below, by implicitly approving Respondent's reliance on what has admittedly been only *intrastate* flotation of logs, brings itself into conflict with all prior adjudications on this subject. (Petition, p. 12).

Respondent's Brief simply does not respond to this point. Yet, this plain conflict presents a substantial issue for review by this Court.

2. A fair reading of Respondent's Brief leads to the conclusion that Respondent does not really contend here that its finding of "commerce" rests on any of the traditional criteria. Throughout, Respondent makes the insistent argument that while the Record and findings may not show "actual use" of the stream in any of the ways traditionally recognized to sustain a "commerce" finding, the "suitability"

for possible future use of the stream for these purposes will suffice. Thus, Respondent urges, without benefit of citation (and in the face of the cases which have always required an actual history of such use), that speculation about suitability for future interstate transportation of logs is adequate. (Resp. Br. pp. 13-14). But all prior cases on this issue have required a showing of substantial, continuous, past use of the stream in order to justify a conclusion that a stream is suitable for use in commerce. (Petition, pp. 12-13).

Again, although no boats of any kind have ever used the stream for interstate transportation of persons or property, there is no reason, Respondent argues, why that may not occur in the future. (Resp. Br. pp. 11-12). But if that be correct, then the bedrock of Respondent's argument is indistinguishable from the arguments which were advanced and rejected in *Leovy* v. *United States*, 177 U. S. 621 (1900). (Petition, p. 8)[1]

3. The impossibility of fitting this case into the framework of existing holdings is also confirmed by the extreme arguments to which Respondent has been forced to resort. For example, Respondent argues that the existence of a 125-year old survey of a route between Lake Memphremagog and the Connecticut River is sufficient, by itself, to support the finding of navigability below (Resp. Br., p. 14).

Respondent relies for this claim on that portion of Section 3(8) of the Federal Power Act which, after defining navigable waters to be "those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce * * * and * * * are used or suitable for use for the transportation of persons or property in interstate or foreign commerce * * *," adds:

[1]We are not unmindful of Respondent's criticism of *Leovy* (Resp. Br., p. 12). However, the inference which Respondent seeks to draw from the citation of *Leovy* in the Court of Appeals' decision in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, is erroneous. *Leovy* was cited and approved ten years after *Appalachian* in a case which was denied certiorari in this Court (*Iowa-Wisconsin Bridge Co.* v. *United States*, 84 F. Supp. 852 (Ct. Cl. 1949) cert. den. 339 U. S. 982 (1950).

> "* * * *together with such other parts of streams* as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority; * * *" (emphasis supplied)

We submit that the clear wording of the statute shows the inappositeness of the argument to the facts of this case.

Section 3(8) makes it clear that Federal jurisdiction attaches to those parts of streams which are "used or suitable for use for the transportation of persons or property in interstate or foreign commerce." If a *part* of a stream is navigable by this definition, then the last quoted provisos of section 3(8) allow an addition to this jurisdiction of "such *other parts*" of streams as have been a) authorized for improvement by Congress or b) recommended to Congress for improvement. The important words are: "together with such other parts of streams." The statute in this respect is analogous to a case of what might be called dependent jurisdiction. If a part of a stream is navigable by the main definition, additional non-navigable parts may, under the specified conditions, be included in the ambit of Federal jurisdiction.

In short, navigability cannot attach to any part of a steam under the "recommendation-for-improvement" proviso unless some other portion of the stream is already within the Federal jurisdiction.

Since the Court below sustained the "navigability" of only the first mile of the stream, Respondent's novel argument cannot avail to support a finding of navigability of that very same reach of the stream.

Furthermore, Respondent's astonishing reliance on this argument is misplaced for the additional reason that Congress never authorized investigation of the Clyde, as a stream, for improvement. In the Court below Respondent cited a statute which purportedly evidenced this authorization.[2] It has not done so here for the simple reason that

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[2] Act of April 30, 1824, C. 46, 4 Stat. 22, 23.

the statute plainly showed that its subject matter was "roads and canals", in obvious distinction to statutes dealing with traditional investigation for improvement of "streams" or other waterways.[3]

Respondent's reliance on the canal survey to prove use or suitability for use of the Clyde River as a link in an interstate or foreign highway of commerce, in conjunction with the Nulhegan and Connecticut Rivers, is ironic when reference is had to the jurisdictional status of that part of the Connecticut River which lies north of North Stratford, the place where the Nulhegan flows into the Connecticut (R.1200). In D. I. 132, (R.144-54), which involved a project impounding water at Pittsburg on the Connecticut River, some twenty miles *north* of North Stratford, the Federal Power Commission rejected jurisdiction despite the fact that the Connecticut River was at that point much larger than the Clyde and had a proved history of logging and commercial use. Respondent's position here would, if successful, distill to the proposition that the Nulhegan, a tributary of the Connecticut, was navigable, while the Connecticut, the main stream, was not navigable at the point of confluence.

Finally, Respondent's reference to and reliance upon *United States v. Cress*, 243 U. S. 316, to substantiate its argument that the construction of an artificial canal evidences in some way the navigability of a stream, is inapposite, if not indeed misleading. The language quoted by Respondent from *Cress* (Resp. Br. p. 14) omits the crucial portion of the Court's holding which showed specifically that the waterways under consideration were concededly navigable, and within Federal jurisdiction, *before* the artificial improvements described.

4. Respondent's reliance on *Pigeon River Improvement Co. v. Cox Co.* 291 U. S. 138 is misplaced. Reference to the rate of fall in the *Pigeon River* case is inapposite because there the finding of jurisdiction rested upon the

[3]See, for example: Act of May 20, 1826, C. 78, 4 Stat. 175. Act of May 24, 1824, C. 139, 4 Stat. 32

incontestable fact that the Pigeon River was an *international boundary stream* over which Federal jurisdiction would exist, entirely aside from every other consideration.

5. We pointed out that the Decision below sustained jurisdiction by reason of its conclusion that *any* effect was sufficient under Section 23(b) of the Federal Power Act (Petition, pp. 15-18). Respondent attempts, on the other hand, to convince this Court that the Decision below actually made a finding that the operation of Petitioner's upstream facilities had a "substantial effect" on the interests of interstate or foreign commerce (Resp. Br. pp. 14-16). We submit that the Decision below, and particularly the quotations therefrom at page 7 of the Petition, demonstrate the contrary.

Critical in this connection is the conceded fact that the one mile reach of the stream which the Court below holds to be navigable, and in which Respondent argues the statutory "effect" is found, is at lake level (Resp. Br. p. 5); that even if the entire Clyde River were eliminated as a source of water for that reach of the stream, the minimum level of that reach would be wholly unchanged. Unlike the fact situation in *Georgia Power Co. v. Federal Power Commission*, 152 F. 2d 908 (C. A. 5 1946), where the downstream reaches which were held to suffer the "substantial effect" depended for their water supply on the flow past those upstream places where the utility's facilities were located, the first mile of the Clyde does not depend for its water supply on upstream sections. Therefore, even if, as Respondent argues (Resp. Br., p. 7), Petitioner could withhold all flow for forty-eight hours, such control will not reduce the minimum level of the first mile of the stream below lake level since that level is controlled by the dam at the Canadian end of the lake.

Finally, the most significant indication that the Court below did not in fact find that there was a "substantial effect" upon the interests of interstate or foreign commerce, lies in the circumstance that the Court below never even mentioned the "principal" effect which Respondent's

Decision purported to find—damage to fish below the Newport powerhouse (R. 1751).

We respectfully submit that the refusal of the Court below to measure, indeed that Court's inability to find, the "substantial effect" required by the statute and the cases, is entirely understandable in the light of Respondent's reliance upon injury to fish as a cornerstone of jurisdiction. That Respondent could compare this kind of "effect" with the "effects" found by the Court, for example, in *Georgia Power Co.*, is a compelling indication of the complete departure of the Decision below from accepted and well defined standards of jurisdiction under Section 23(b) of the Federal Power Act.

Injury to fish has never been held or even suggested to be that kind of an effect which could create jurisdiction under Section 23(b) of the Federal Power Act.

Furthermore, it is uncontested on this record that the evidence relating to injury to fish was entirely limited to reaches *upstream* from the one-mile lake level portion of the river which the Court below held to be "navigable" (R. 1751). Therefore, contrary to all prior adjudications, Respondent relied for its finding of jurisdiction upon an "effect" which was not even located in the portion of the stream otherwise held to be navigable waters of the United States.

CONCLUSION

Respondent's Brief does not deny that the Clyde River is the smallest, most insignificant stream which Respondent has ever attempted to bring within its jurisdiction. Respondent does not deny that, as the Chief Presiding Examiner held, no proceeding has been cited in which the volume of commerce was so small as that shown here.

We respectfully urge that if the Decision of the Court below be permitted to remain, if its holdings be not reviewed by this Court in accordance with the questions which we have presented in the Petition, there is no dam on any stream which is not within the jurisdiction of the Respondent.

We respectfully submit that for the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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